ROUND TABLE
of Former Immigration Judges

September 24, 2020

Lauren Alder Reid, Assistant Director
Office of Policy, Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
Falls Church, VA 22041
Federal eRulemaking Portal: http://www.regulations.gov.

Re: Comments in Opposition to Proposed Rulemaking: 85 FR 52491
RIN 1125-AA96
EOIR Docket No. 19-0022

Dear Ms. Alder Reid,

The Round Table of Former Immigration Judges is composed of 47 former Immigration Judges and Appellate Immigration Judges of the Board of Immigration Appeals. We were appointed by and served under both Republican and Democratic administrations. We have centuries of combined experience adjudicating asylum applications and appeals. Our members include nationally-respected experts on asylum law; many regularly lecture at law schools and conferences and author articles on the topic.

Our members issued decisions encompassing wide-ranging interpretations of our asylum laws during our service on the bench. Whether or not we ultimately reached the correct result, those decisions were always exercised according to our "own understanding and conscience,"[1] and not in acquiescence to the political agenda of the party or administration under which we served.

We as judges understood that whether or not we agreed with the intent of Congress, we were still bound to follow it. The same is true of the Attorney General, Secretary of Homeland Security, and for that matter, the President.

INTRODUCTION

Initially we note that the current practice of reducing the time for notice and comment, severely undermines the ability for the public to digest and comment on rules. The reduction of time to

[1] *See Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954).

30 days violates the intent of Congress to give full deliberation to regulatory changes. As experienced adjudicators, we are in a unique position to contextualize these changes, but even with our experience, the breadth of these proposed regulations should allow for additional time to review and comment.

Next, we note that the Notice of Proposed Rulemaking (NPRM), contains changes that continue to diminish the role and function of the Board of Immigration Appeals (BIA) as an independent adjudicatory body free from political pressure. For example, the granting of certification authority to judges who are supposed to be subject to the appellate review of the BIA, does not further the objectives of finality or due process. Further, these rules are slanted in ways that diminish actions and take away tools used by Immigration Judges and Board to manage dockets and ensure consideration of changed circumstances that might arise for either party. Under the NPRM, the Department of Homeland Security is invited to utilize unlimited power to reopen cases for negative information, and all opportunity for respondents to obtain reopening for new information have been removed.

In our review we do not object to the clarifications and changes regarding: 1) finality; 2) the expansion of the authority to grant voluntary departure to the BIA; and 3) having cases that only need security checks being placed on hold by the BIA.

However, we do object to: 1) the proposed shortened briefing schedule; 2) simultaneous briefing in non-detained cases; 3) the prohibition from receiving new evidence on appeal, remanding a case for the immigration judge to consider new evidence in the course of adjudicating an appeal, or considering a motion to remand based on new evidence; 4) the elimination of the ability of immigration judges to consider issues beyond the express scope of the remand; 5) giving Immigration Judges Certification Authority over BIA decisions; 5) the proposed elimination of administrative closures; 6) the proposed elimination of the delegation of sua sponte reopening authority; 7) removal of BIA certification authority; 8) the imposition of new deadlines and timeframes for adjudication of appeals with those failing to be adjudicated in the specified time being referred to the EOIR Director for adjudication; and 9) the elimination of Immigration Judge review of transcripts.

In short, there is little in the NPRM, that furthers the interests of ensuring a fair and neutral adjudication. We are concerned with the overall diminshment of the BIA as an appellate body.

A. BRIEFING EXTENSIONS

In the NPRM, EOIR describes an unprecedented increase in the number of appeals received by, and pending before, the BIA. The increase is a result of prior actions by the Department. The speed with which those judges must adjudicate cases to conform with the agency-imposed completion quotas and the Family Unit (FAMU) [2] deadlines coupled with the recent addition of

[2] "Family Unit" is a term created by the Department of Homeland Security as an "apprehension classification" which consists of an adult noncitizen parent or legal guardian, accompanied by his or her own juvenile noncitizen child. See: Jeffrey S. Chase | Opinions/Analysis On Immigration Law, EOIR Creates more Obstacles

large numbers of Immigration Judges inevitably led to more decisions, and thus more appeals. Furthermore, the Attorney General eliminated the judges' ability to administratively close cases and thus alleviate some pressure on the system by temporarily removing those closed cases from the pending queue.[3]

The Attorney General also vacated precedent decisions that, for example, recognized certain particular social groups as cognizable, which had previously served as a basis for many stipulated grants of asylum that did not require appeal to the BIA.[4] The A.G.'s actions have not only resulted in much lengthier merits hearings, at which more witnesses, evidence, and legal arguments are required to reach the same grant of asylum that was previously accomplished through stipulation, but have also led to more appeals, by the Department of Homeland Security (DHS) where asylum is granted, and by the respondent where it is not.

While the agency's policymaking has resulted in crushing backlogs, it now seeks to penalize both government and defense counsel by providing them less time for the drafting and filing of their appellate briefs. It is significant that it generally takes between 15 and 20 months from the time a notice of appeal is filed with the BIA until the agency mails the parties the transcript, IJ decision, and briefing schedule. Given that lengthy agency-caused delay of well over a year, cutting weeks from the briefing schedule hardly seems likely to have much impact on the agency's stated goal of expediting the appellate process in response to the growing backlog.

However, the shortened briefing schedule will have much more than the "relatively little impact on the preparation of the cases by the parties on appeal" claimed by the agency in the NPRM at 29-30. Frankly, such statement evidences a lack of understanding or experience with how the appellate process works, particularly from the perspective of the respondents and those who represent them.

In support of its claim, the agency cites to statistics from Fiscal Year 2019, noting that in 17,069 cases in which the BIA sent briefing schedules, no brief was received by the respondent in 4,400 of those cases, and no brief was filed by DHS in 10,900 cases. NPRM at 29. What those statistics fail to explain is the reason for the non-filings. For example, might DHS have failed to file briefs because it lacked the capacity to do so? Hiring of ICE attorneys has not kept pace with the hiring of new IJs, requiring those attorneys to spend far more time in court, leaving less time for drafting briefs. Would allowing more time for briefing have led to an increase in the number of DHS briefs filed?

The fact that many do not file briefs is not a reason to deny briefing time for those who do. Likewise, while the overwhelming majority (74.2%) of respondents did file briefs, would the 4,400

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for Families, Dec. 2018 at: https://www.jefferychase.com/blog/2018/12/13/eoir-creates-more-obstacles-for-families.

[3] *See Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018). The present NPRM seeks to codify the A.G.'s holding, which has to date has been invalidated by the two U.S. Courts of Appeal, (4th and 7th) that have considered it.

[4] *See*, *e.g.*, *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019). Both decisions were certified on the A.G.'s own motion, and vacated holdings that were not contested by either party.

who did not have benefited from additional time, considering the pressures on not-for-profit service providers at present? In the absence of more information as to the reasons for the non-filings, the statistics alone certainly don't serve to justify the proposed changes.

At present, the appealing party is granted 21 days to file its brief, but it is actually less given the briefing time allowed begins to run when the transcript is mailed by the BIA clerk's office in Falls Church, VA. As the BIA does not yet have electronic filing, a party using overnight mail to file its brief is reduced to a 20-day briefing period; and if it takes three or four days to receive the mailing from the BIA, the time is then reduced to 16 or 17 days.[5] The proposed rule fails to consider present mail delays caused by cuts to the U.S. Postal Service, which deprive the parties of valuable briefing time. Further days lost due to mail slowdowns create a significant shortening of the remaining briefing time.

The agency's statement that the shortened drafting time shouldn't have much impact because 78 percent of respondents are represented on appeal is also disconnected from reality.[6] NPRM at 28-29. The huge increase in Immigration Judges and scheduled hearings requires lawyers to spend more time attending and preparing for those hearings, leaving less time for drafting briefs. Not-for-profit service providers are particularly impacted, because their budgets, which include their annual staffing requirements, are set in advance for the fiscal year. Whereas a private law firm can hire additional associates in response to the increase in workload, not-for-profits don't enjoy that flexibility. A decrease in briefing time will mean that not-for-profits will have less capacity to provide representation, at a time when newly-arrived asylum seekers are subject to new regulations requiring them to wait twice as long for the employment authorization that might allow them to afford to retain for-profit representation.

However, even if we were to assume arguendo that the 78 percent of represented respondents will be minimally impacted by the change, what about the remaining 22 percent lacking representation? That is hardly a negligible number; it constitutes more than one in five appellants.

Under the prior administration, a 21-day briefing extension was automatically granted to either party upon request. Requests for additional extensions were considered on a case-by-case basis. The proposed rule specifically states that extension requests should not be automatically granted.

The proposed rule states that "the Board expects any extension request to be for the purpose of completing or finalizing a brief - rather than drafting it from the beginning" as justification for limiting extensions to 14 days. *See* NPRM at 27-28.

While this may often be the case, the agency ignores the following realities in expressing such a generalization:

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[5] The rule references the pilot project, moving EOIR toward electronic filing but that process does not currently support electronic receipt of the record.

[6] Interestingly, the NPRM cites the 78 percent representing figure as evidence of a high representation rate on appeal, but cites numbers constituting a very comparable 74.2 percent as evidence of the low rate of cases briefed on appeal.

(1) Where an appellant is represented by a law school clinical program, the timing of such programs' ability to draft briefs is dictated by the school academic calendar. A briefing schedule issued during summer or the lengthy winter recess between semesters will likely require an extension not merely for editing or finalizing, but for assigning and beginning to draft.

(2) Pro se appellants might first have to seek and retain representation upon receipt of the briefing schedule. Given the present overwhelming volume, private attorneys and in particular, not-for-profit service providers are often unable to commit to drafting a brief until the timing is known, i.e. when the briefing schedule is received. Given the complications caused by the coronavirus pandemic, pro se appellants might need most or all of the initial 21 day filing period simply to secure representation.

It would seem that a policy of automatic extension for the asking would be more in line with the agency's stated goal of increased efficiency, as it would prevent the need for an already understaffed BIA to assign resources to making case-by-case extension determinations. While the proposed rule states that the change would not eliminate the BIA's continued ability to extend the time allowed for filing a brief for good cause shown, the reality is that the BIA is under pressure to move cases more quickly. The BIA's intent to significantly increase completion quotas for BIA staff attorneys does not bode well for that same tribunal exercising its discretion to grant additional time for good cause shown. Furthermore, the uncertainty of obtaining extensions on a case-by-case basis would require counsel to assume that the extension might be denied, thus defeating the entire purpose of requesting the extension.

The proposed rules are further misguided in stating that attorneys should be able to prepare briefs even without access to the transcript, relying on the 78 percent representation figure noted above (which again ignores the significant 22 percent of appellants who are pro se). However, that statistic does not indicate that appellate counsel also represented the respondent below. In fact, the same chart referenced in the NPRM shows that 37 percent, or a whopping 410,152 respondents, were unrepresented in their Immigration Court proceedings. Others change counsel on appeal. Thus, newly-retained appellate counsel might have no idea of the issues on appeal prior to reviewing the transcript.

Of course, most IJ decisions are issued orally; the respondent leaves the courtroom with only a Memorandum of Decision, a form on which the IJ checked boxes indicating what relief was granted or denied. For example, a checked box indicating, that asylum was denied does not inform appellate counsel the specific basis for denial, such as whether the basis for denial involved an adverse finding as to credibility, corroboration, nexus, the government's willingness or ability to control non-state persecutors, internal relocation, the cognizability of the particular social group, the timeliness of the asylum application, firm resettlement in another country, or possibly some other reason. Considering the complexity of asylum and most other IJ determinations, a pro se respondent is not likely to be able to explain the intricacies of the IJ's denial to prospective counsel. Thus, it is not realistic to expect that counsel would not only be in a position to agree to provide representation, but furthermore, to be able to begin drafting a brief in advance of receiving the transcript and IJ decision.

B. SIMULTANEOUS BRIEFING

The proposed rule will require simultaneous briefing deadlines on all cases, including those involving non-detained respondents.[7] In its desire to save 21 days, the agency ignores the problems inherent in requiring one party to reply to arguments without knowing what those arguments are. The responding party must guess as to what arguments the appellant might raise, and what case law it might cite. Of course, arguments not raised on appeal are deemed waived. But simultaneous briefing does not allow the responding party to know whether or not an argument is being waived by opposing counsel.

The simultaneous briefing requirement would virtually guarantee the need for at least one party to file a second reply brief after the simultaneously-filed brief has been received and read. This process would unnecessarily create additional work for at least one of the parties at a time where both parties' resources are overwhelmed. Moreover, even under the current rules, which allow for reply briefs in detained cases, the BIA is not obligated to wait the 14 days for a reply brief, because acceptance of a reply brief is subject to the Board's discretion and the proposed rule appears to abrogate even that level of protection.

Currently, the BIA Practice Manual does not provide an automatic right to file a reply brief. Section 4.6(h) of the BIA Practice Manual states that regarding reply briefs, the Board does not normally accept briefs outside the time set in the briefing schedule. Any reply responding to a simultaneously-filed brief will obviously fall outside of such briefing schedule. It thus becomes a question of whether the Board will, in its discretion, choose to grant a motion to accept a late filed brief. Should the Board refuse to delay its adjudication to accept reply briefs, *albeit technically late-filed,* the parties would be greatly penalized by being unable to know the specific arguments and case law they must respond to. Under the circumstances, routinely accepting reply briefs would be necessary to achieve fairness.

The BIA is not managing a factory assembly line, but is, rather, the sole administrative tribunal hearing appeals of individuals often facing life-or-death consequences. In the agency's need to strike a balance between efficiency and due process, the scale must always be weighted in favor of due process. Thus, in the end, the proposed rule would not achieve its objective of increasing efficiency and speeding up the appeal process.
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[7] We acknowledge that simultaneous briefing for detained cases has occurred but it can be justified because the Respondent is in fact detained, and so both the Respondent's and the Government's interests are served by the filing of simultaneous briefs, whereas no such critical justification is present for non-detained cases. Moreover, the BIA Practice Manual at 4.7(a)(ii) states the current rule for detained Respondents as: (ii) Detained cases. – When an appeal is filed in the case of a detained alien, the alien and DHS are both given the same 21 calendar days in which to file their initial briefs. The Board will accept reply briefs filed by DHS or by the alien within 14 days after expiration of the briefing schedule. No such provisions exist in the NPRM.

C. BIA REMANDS FOR IDENTITY, LAW ENFORCEMENT, OR SECURITY INVESTIGATIONS OR EXAMINATIONS

The Round Table of Former Immigration Judges agrees with the Agency's proposed regulatory change to the procedures for "BIA Remands for Identity, Law Enforcement, or Security Investigations or Examinations."[8] We agree that when a case before the BIA requires the completion of or update to background checks, rather than remand the case to the Immigration Court, that the BIA place the case on hold.[9] As former Immigration Judges and Appellate Immigration Judges, we understand and appreciate the stress such remands place on the dockets of the Immigration Courts as well as the impact they have on respondents, whose cases may be unnecessarily delayed for months or years awaiting an order from the judge to complete background checks. It is much more efficient to have the BIA hold the case pending a report on the checks from DHS. Accordingly, we agree with this aspect of the proposed changes.

However, we believe that providing DHS with 180 days to complete its background checks in order to avoid a remand, is too long. The proposed rule provides DHS 180 days to report the results of the background checks while the case remains on hold at the BIA.[10] In most case the checks are now automated and can be done much more quickly, without any action on the part of the respondent. Where a grant has been made by the BIA, barriers toward ensuring status should be diminished and the unequal time periods in the proposed rule do not make sense.

Additionally, in situations where new biometrics are required a respondent cannot generate an appointment, but must wait for DHS to schedule one. Thus, penalizing the respondent by creating a 90- day period in which to comply with background check requirements,[11] without tying that time to the DHS request for new data needlessly adversely affects respondents who have been granted relief and should be welcomed rather than penalized by a process over which they have no control.

D. FINALITY OF BIA DECISIONS AND VOLUNTARY DEPARTURE AUTHORITY

The Round Table of Former Immigration Judges agrees with the Agency's proposed regulatory change to the procedures for "Finality of BIA Decisions" [12] and generally agrees with granting the BIA authority to issue "Voluntary Departure."[13]

The proposed amendment in 8 CFR 1003.1(d)(7)(i)[14] regarding the authority to issue final orders is long overdue. Unlike other provisions in these proposed regulations, this section treats all parties appearing before the BIA equally and notes that the clarified authority applies to both orders of removal and grants of relief or protection.

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[8] 85 Fed. Reg. 52499.
[9] 85 Fed. Reg. 52499.
[10] 85 Fed. Reg. 52499.
[11] 85 Fed. Reg. 52499.
[12] 85 Fed. Reg. 52412.
[13] 85 Fed. Reg. 52412.
[14] 85 Fed. Reg. 52511 and 52514.

Regarding Voluntary Departure, as former Immigration Judges and Appellate Immigration Judges, we agree that a remand solely for the purpose of instituting a Voluntary Departure order falls into the category of remands that place stress on the dockets of the Immigration Courts and unnecessarily lengthen the time needed to complete cases. Further the BIA has had the authority to institute previously issued Voluntary Departure orders and this extension with the accompanying requirement that the respondent seek this relief on appeal substantially protects the parties who have the opportunity to create a record below and on appeal.

However, in our experience there are times when an Immigration Judge has not afforded the respondent the opportunity to create a record or has not given the appropriate advisals, and to the extent that these errors need to be addressed, flexibility to remand for development of the record when necessary should not be proscribed. As noted elsewhere in these comments, we are deeply concerned about the way the role of the BIA, in relation to the lower court as a reviewing entity, is adversely impacted by these proposed regulations. The ability to remand cases is an important tool; it should not be eliminated from the BIA authority. In addition, we believe it is important that the BIA have a clear mechanism to provide voluntary departure advisals if granting in the first instance. This is particularly important to pro se respondents and non-English speakers.

E. PROHIBITION ON CONSIDERATION OF NEW EVIDENCE, LIMITATIONS ON MOTIONS TO REMAND, FACTFINDING BY THE BIA, AND THE STANDARD OF REVIEW

The Round Table of Immigration Judges opposes the proposed changes to 8 C.F.R. § 1003.1(d)(7).[15] Under proposed 1003.1(d)(7)(v), "the BIA would be prohibited from receiving new evidence on appeal, remanding a case for the immigration judge to consider new evidence in the course of adjudicating an appeal, or considering a motion to remand based on new evidence."[16] The agency justifies this limitation on receiving new evidence on appeal and motions to remand in order to ensure the presentation of all available evidence at the immigration court stage and to ensure the efficient resolution of appeals.[17] While we are sympathetic to the need to resolve cases, and agree that an appellate body should not receive new evidence on appeal, the elimination of motions to remand based on new evidence is highly concerning. The agency further states that "respondents frequently seek remands based on evidence that could have been submitted to the immigration judge in the first instance."[18] The agency also accuses respondents of "gamesmanship".[19] While this may happen, in our experience, it is a rare exception and not the rule. Such accusations fail to recognize the important and far more prevalent situations where there are valid reasons for reopening to present new evidence, such as changes in the law, evidence that was previously unavailable, and changes in circumstances that result in eligibility for a new form of relief. Moreover, "gamesmanship", to the extent it does occur, is properly dealt with by denying the motion to remand in specific cases where the evidence was not previously unavailable.

[15] 85 Fed. Reg. 52500.
[16] 85 Fed. Reg. 52500.
[17] 85 Fed. Reg. 52501.
[18] 85 Fed. Reg. 52501.
[19] 85 Fed. Reg. 52501.

Due to the expansive nature of the proposed regulatory change, new evidence that was not previously available or changes in law that occur over the course of the proceedings would not support a remand. Because of the limited exceptions set forth in the proposed rule, the BIA would be barred from remanding even if there were a change in the law, unless the change affected grounds of removability. Immigration law is complex; the caselaw is constantly changing due to litigation in the federal courts. However, under the proposed rule, there would be no ability for the BIA to remand based on new grounds of relief available to a noncitizen who benefits from a change in law. This does not comport with due process or the rule of law.

Moreover, as former Immigration Judges, we heard cases that, through no fault of the respondents, took years to resolve, including cases that were pending at the BIA for months or years. In many of those cases, respondents experienced significant life circumstances changes some of which resulted in actions taken by DHS affecting eligibility. Under the proposed rule, these changes could not be considered.

In real life, over long periods of time, respondents marry, divorce, have children; and respondents' employment status may change. As a result, noncitizens become eligible for relief (such as immediate relatives of U.S. citizens), noncitizens with an approved application for SIJS, U and T visa applicants, or noncitizens with derivative asylum status through a spouse or parent. All of these relevant changes would be meaningless becasue the respondents would be foreclosed from reopening their removal orders. Of course, the finality of proceedings is important but so is the integrity of the proceedings. If an injustice is committed, why would we strip judges and board members of the ability to remedy it? All of these life events can impact the availability or lack of availability of immigration benefits. Such changes should be considered in the course of a motion to remand if appropriate.

The current rules do not require granting all motions to reopen and remand to present new evidence. The Appellate Immigration Judges on the BIA can be expected to recognize motions for presentation of new evidence that was previously available, and those based on changed circumstances. The Board should not be stripped of the power to grant valid motions. It is an important judicial tool, necessary to assure flexibility for cases that merit it.

The language of the proposed rule unfairly favors the government over the respondent. Proposed 8 C.F.R. § 1003.1(d)(7)(v) reads "[s]ubject to paragraph (d)(7)(v)(B) of this section, the Board shall not receive or review new evidence submitted on appeal, shall not remand a case for consideration of new evidence received on appeal, and shall not consider a motion to remand based on new evidence. A party seeking to submit new evidence shall file a motion to reopen in accordance with applicable law."[20] The exceptions set forth at subsection (B) are extremely limited and include new evidence about identity and background investigations.[21] Thus, the agency is creating exceptions for the consideration of new evidence from DHS but not from respondents. It allows DHS to investigate non-citizens without end, and seek remand if an adverse issue is uncovered, but if new relief materializes, a conviction is overturned, or the law changes to the benefit of a respondent, a remand is nevertheless prohibited. Such a rule eviscerates due process in

[20] 85 Fed. Reg. 52511.
[21] 85 Fed. Reg. 52511.

removal proceedings and undermines finality, by allowing DHS to perpetually hold the threat of reopening over respondents.

F. SCOPE OF A BOARD REMAND

The Round Table of Immigration Judges opposes the proposed changes to the scope of a BIA remand. Under current BIA caselaw, unless the BIA expressly limits the scope of the remand, the immigration judge can consider issues beyond those for which the case was remanded.[22] However, the agency proposes to eliminate the ability of immigration judges to consider issues beyond the express scope of the remand.

Pursuant to proposed section 1003.1(d)(7)(iii), *"*[t]he Board may qualify or limit the scope or purpose of a remand order without retaining jurisdiction over the case following the remand. In any case in which the Board has qualified or limited the scope or purpose of the remand, the immigration judge shall not consider any issues outside the scope or purpose of that order, unless such an issue calls into question the immigration judge's continuing jurisdiction over the case."[23]

As discussed in Section E above, respondents experience various life events over the course of their removal proceedings. Respondents may marry, divorce, have children, and have relatives pass away. Such major life events are often relevant to eligibility for relief. In addition, some respondents have criminal convictions overturned during the course of their proceedings, which impact removability and eligibility for relief. Moreover, as discussed in Section E above, the law changes with regularity due to federal court litigation. Under this proposed section, immigration judges would be prohibited from considering any of the above factors in remanded proceedings if the BIA limits the scope of the remand. This proposed rule ignores the reality of immigration court proceedings and the lives of those who appear in immigration court. It strips any semblance of fairness from proceedings by requiring immigration judges to wear blinders in remanded cases. In cases where the law has changed, an immigration judge should not be prohibited from considering whether the change in law impacts the respondent's case simply because the BIA remanded for a different purpose. Such a rule inhibits an immigration judge's ability to apply the rule of law and afford due process in remanded removal proceedings.

We believe proposed section 1003.1(d)(7)(iii) of 8 C.F.R. is another attempt by the agency to strip independence and discretion from the immigration judge corps. It is an attempt to turn immigration judges into mindless adjudicators who ignore the realities of the circumstances and lives appearing in their courtrooms. We therefore strongly oppose this proposed amendment to the regulations.

G. IMMIGRATION JUDGE QUALITY ASSURANCE CERTIFICATION OF A BIA DECISION

The Round Table of Immigration Judges opposes the proposed rule change giving Immigration Judges Certification Authority over BIA decisions. It is wholly inappropriate for a trial judge to

[22] Matter of Patel, 16 I. & N. Dec. 600, 601 (BIA 1978)
[23] 85 Fed. Reg. 52511.

have the authority to appeal from an appellate tribunal's decision which reverses her/him. In our system of justice, only parties can appeal from decisions they don't like. Immigration judges are neutral arbitrators, not parties in the cases they hear. If they are reversed, or a case remanded to them by the appellate body, trial judges are bound to follow the law of the case.

The stated justification for these rule changes that "the Board does not have a formal quality assurance process to ensure that its remand decisions provide appropriate and sufficient direction to the immigration judges,"[24] is nonsensical. Appeals are not for the purpose of "quality control." Further, the commentary comparing the BIA with the Social Security Administration (SSA) adjudicatory system is inapposite.[25] Rather than promoting "quality assurance," this proposed rule undermines the integrity of the BIA.

Any adjudicator who is overturned on appeal or who receives a remand, may disagree with the decision of the appellate body, but it is fundamental to our system of jurisprudence that appellate bodies have authority to reverse decisions by triers of fact. While the commentary states that the process "is limited only to cases in which the immigration judge articulates a specific error allegedly committed by the Board within a narrow set of criteria"[26] and the proposed rule states: "The quality assurance certification process shall not be used as a basis solely to express disapproval of or disagreement with the outcome of a Board decision unless that decision is alleged to reflect an error described in paragraph (k)(1) of this section."[27] The bases on which an IJ would be able to certify a case to the Director are so broad—including, for example, that the IJ believes that the BIA decision is contrary to law, or is "vague"—that an IJ who simply disagrees could construct an argument that would fall under these rules. Rather than promoting quality assurance, this proposed rule would undermine the authority and integrity of the BIA codify procedures that circumvent the regular order of appeals.[28]

It should also be noted that the rule does not specify the rights of a respondent who was granted relief by the Board, nor does the rule specify the time frame in which the Director must render a decision. If the respondent is detained, prolonged detention could result. Such a result would be patently unfair and a further example of the ways in which the rules fail to afford due process.

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[24] 85 Fed. Reg. 52496.

[25] It is a comparison that does not make sense. In contrast to BIA appellate judges who serve under the delegated authority of the Attorney General, the SSA adjudicators are Administrative Law Judges who do not act under delegated authority; second the SSA process does not allow the Secretary of Health and Human Services to overturn decisions. In contrast the existing immigration process, with Attorney General review sufficiently provides quality assurance.

[26] 85 Fed. Reg. 52502.

[27] 8 CFR 1003.1(k)(4), 85 Fed. Reg. 52512.

[28] It was precisely this type of procedure, which has been highly criticized as irregular, that was involved in the Attorney General's decision in *Matter of A-B-* 27 I&N Dec. 316 (A.G. 2018). In that case, the BIA had reversed a decision denying asylum to a woman who had survived domestic violence and remanded to the Immigration Judge with instructions to order a biometrics check, and to grant the application dependent upon a favorable biometrics check, The Immigration Judge, who expressed disagreement with precedents authorizing asylum for domestic violence victims, is suspected of using back channels to bring the case to the attention of the Attorney General, who certified it to himself despite no opposition to the grant of asylum by either of the parties. See, Center for Gender and Refugee Studies, Backgrounder and Briefing on *Matter of A-B-*, (Aug. 2018), https://cgrs.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b. This new reg appears to be a retroactive device to authorize conduct that was publicly perceived and criticized as improper.

Moreover, affording the Director, an administrator and political appointee who is not a judge, this level of adjudicatory authority is concerning and problematic.

The final justification for the change is that "an erroneous remand by the BIA inappropriately affects an immigration judge's performance evaluation."[29] The National Association of Immigration Judges (NAIJ) has argued that performance quotas conflict with the judicial canon of ethics.[30] As former Immigration Judges and Appellate Judges, we agree with the NAIJ and do not believe that one improper process justifies another.

H. 8 CFR 1003.1(d)(1)(ii) and 1003.10(b); ADMINISTRATIVE CLOSURE

We strongly oppose the proposed amendments to 8 C.F.R. §§ 1003.1(d)(1)(ii) and 1003.10(b) that generally eliminate administrative closure, and codify the Attorney General's decision in *Matter of Castro-Tum*.[31] The rationale provided in the proposed regulations is not consistent with our collective experience as adjudicators who used administrative closure as an important and effective tool for docket management. As former Immigration Judges and Appellate Immigration Judges, we are certain that administrative closure is a critical tool for the Immigration Judge to efficiently manage the Court's docket. Our decades of experience counsels that for many immigrants, the ultimate resolution of their case lies outside of the jurisdiction of the Immigration Court, and with USCIS. Qualifying victims of crimes are eligible for a U visa and accompanying waiver, which the Immigration Judge has no jurisdiction to grant. Nor is an Immigration Judge able to grant an I-130 visa petition to a qualified respondent in removal proceedings, so that they may gain lawful status in the United States. Jurisdiction over these important petitions and applications rest with USCIS, a division of the Department of Homeland Security, and their adjudication requires time for the application or petition to process.

As a preliminary matter, we are confident that there is clearly established authority for Immigration Judges to administratively close cases.[32] For decades, administrative closure has been a tool used by the Court and the Board, and requested by both respondents and the Department, as a tool to take matters off of the active docket. The litigation challenging the Attorney General's contrary decision in *Matter of Castro-Tum* confirms this clear authority of Immigration Judges to administratively close cases. Both the Fourth and Seventh Circuits recognize that the Immigration Judge's independent authority to administratively close cases is consistent with both the regulations and the Act.[33] The proposed regulation, based on inaccurate assumptions, attempts to

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[29] 85 Fed. Reg. 52502.

[30] *See* National Association of Immigration Judges, Testimony Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on "Strengthening and Reforming America's Immigration Court System" at 8 (Apr. 18, 2018) ("In addition to putting the judges in the position of violating a judicial ethical canon, such quotas pits their personal interest against due process considerations.").

[31] 27 I&N Dec. 187 (A.G. 2018).

[32] 8 C.F.R. § 1240.1(a).

[33] *See Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019) (abrogating *Matter of Castro-Tum* in the Fourth Circuit*); see also Morales v. Barr*, 963 F.3d 629 (7th Cir. 2020) (same with regard to the Seventh Circuit).

strip authority that Immigration Judges and Appellate Immigration Judges have exercised for at least forty years.

In order to rationalize eliminating this important administrative tool, the proposed regulations erroneously refer to administrative closure as "indefinite adjournment" of removal proceedings. This is inaccurate. The adjournment is without date, but is limited in duration. In fact, previous Board case law had carefully crafted a six-factor test to ensure that closure was limited in duration when Immigration Judges closed cases without the consent of both parties. Indeed, *Matter of Avetisyan* required the Immigration Judge to carefully weigh six factors when considering the administrative closure of a case: (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application or any other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, to contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings when the case is recalendared before the Immigration Court or the Board.[34] A motion to administratively close where the proposed period of potential closure is indefinite would not easily fit under the reasonable factors listed in *Matter of Avetisyan*. The vast majority of administrative closure motions that came before this diverse group of adjudicators involved pending visa petitions where, once processed, the respondent would be either eligible for dispositive relief before the Court, or no longer removable from the United States. The length of the adjournment was not indefinite, but rather limited by the time it took the government to process the petition or application.

The suggestion in the proposed regulation that the cases administratively closed under *Matter of Avetisyan* would have been "otherwise completed" absent administrative closure is misleading. Cases administratively closed under *Matter of Avetisyan* involved respondents with collateral applications pending at DHS' USCIS that had demonstrated a sufficient probability of success that the Immigration Judge believed allowing the agency time to process the application would be the most efficient course of action. Objective data bears out what we know to be true: after re-calendaring, over sixty percent of respondents either were granted relief by the Court, or had proceedings terminated because they were no longer removable.[35] The re-calendared hearings were invariably brief. Had those cases not been administratively closed, the bulk of respondents' cases would have required lengthy hearings, and many would have been deprived of the opportunity to receive immigration benefits for which they were eligible pursuant to the I&N Act. For example, respondents seeking status as the spouse or child of a citizen, a crime victim assisting law enforcement, or an unaccompanied child seeking Special Immigrant Juvenile status with the USCIS or asylum before the asylum office, both of which are housed in DHS, which is one of the parties in the cases before Immigration Judges. The only alternative to administrative closure that would protect due process is repeated continuances, a process which is excessively inefficient and resource draining.

We strongly disagree with the proposed regulation's rationale that administrative closure is responsible for the current unprecedented case backlog at EOIR, and that it was a failed policy.

[34] 25 I&N Dec. 688, 696-97 (BIA 2012).
[35] TRAC Immigration, "The Life and Death of Administrative Closure," https://trac.syr.edu/immigration/reports/623/ (last accessed Sept. 13, 2020).

This is not borne out by either experience or objective data. In our decades of experience, the Court's ability to sensibly manage its docket through administrative closure allowed for disposition of cases with fairness and due process as a guiding objective. Objective evidence supports our considerable experience. A September 2020 analysis by TRAC of EOIR's own data determined that administrative closure helped reduce the backlog of cases at the Court, rather than contributing to the backlog.[36] Allowing Immigration Judges and Appellate Immigration Judges to prioritize cases on their dockets using their professional expertise results in an efficient Immigration Court system. The experience since the AG's precedent decision in *Castro-Tum,* shows that taking away administrative closure has, predictably, only greatly increased the backlog.

I. SUA SPONTE AUTHORITY

As former Immigration Judges and Appellate Immigration Judges, we strongly oppose the proposed elimination of the delegation of sua sponte reopening authority found at 8 C.F.R. §§ 1003.2(a) and 1003.23(b)(1). Sua sponte reopening authority is a necessary authority for Immigration Judges and the Board to ensure that due process is the guiding principal of our system, rather than expediency and finality. The proposed elimination of sua sponte reopening authority profoundly concerns us, as we are well aware that this limited authority helps preserve the fairness of our complex immigration system, especially for unrepresented, indigent respondents.

Sua sponte reopening authority is necessary in an imperfect system where lives are at stake. Each of us faced compelling motions to reopen which failed to meet the regulatory requirements, but also did not present extraordinary circumstances for sua sponte reopening, and those motions were denied. Similarly, we have adjudicated motions to reopen that—to provide due process to the unusual respondent in extraordinary circumstances—were appropriately granted under the Court's sua sponte authority. Sua sponte reopening authority is an especially important power for adjudicators adjudicating the claim of an unrepresented respondent. In our experience, many cases that are appropriately reopened under a Judge's sua sponte authority are the result of unrepresented respondents unknowingly failing to complete a ministerial task, such as timely submitting a change of address form, resulting in cascading immigration consequences, often for years. The purpose of the Immigration Court system is not expediency, but rather due process for those appear before it. Stripping the adjudicator of the ability to reopen the extraordinary case that is otherwise final and does not otherwise meet the stringent standards for reopening makes the system less fair.

We reject in the strongest possible terms the rationale in the proposed regulation that sua sponte authority should not exist because of its "potential for inconsistent usage and abuse." From our decades of experience, we know that the Department of Justice carefully vets and hires Immigration Judges and Board members precisely because of their ability to exercise sound judgment and discretion, in accordance with the Constitution and binding laws. Collectively, we have decided many tens of thousands of cases, and are keenly aware that each one represents a person's life, and not simply a completion number on a dashboard. Each of us appreciated that sua sponte authority was to be exercised in truly extraordinary circumstances and was not meant as a general cure for filing defects, and we adjudicated motions accordingly.

[36] TRAC Immigration, "The Life and Death of Administrative Closure," https://trac.syr.edu/immigration/reports/623/ (last accessed Sept. 13, 2020).

J. CERTIFICATION AUTHORITY

The Round Table of Immigration Judges opposes the proposed amendments with respect to the elimination of certification authority by the BIA. As with other provisions in these rules, the agency is prioritizing efficiency and speed over due process and accuracy. The commentary regarding the change is internally inconsistent, noting that the clear language requires jurisdiction, see 8 CFR 1003.1(c) while stating that use of the provision to verify such jurisdiction is not allowed.

If the issue is the lack of "definition of 'exceptional' situations for purposes of utilizing self-certification"[37] the better remedy would be to define the circumstances when the use of the authority is warranted. A regulatory system that strips the BIA of this authority while expanding the role of the Director and immigration judges to use a certification process undermines the authority and legitimacy of the BIA. This amendment appears to be intended as retribution against the BIA for past decisions which the current political appointees don't like.

K. TIMELINESS OF ADJUDICATION OF BIA APPEALS

The Round Table of Immigration Judges opposes the proposed amendments with respect to the timely adjudication of BIA appeals. The agency is prioritizing efficiency and speed over due process and accuracy. The rule strips appellate immigration judges of independence and the ability to manage their dockets. The agency proposes to change the BIA's case management system, set deadlines for the adjudication of appeals, and sets time frames for different phases of the appellate process.[38] While we support creating efficiencies in an overwhelmed system, we strongly oppose arbitrary deadlines that impact appellate immigration judges' ability to accurately and fairly perform their duties.

The agency cites to the increasing backlog of cases at the immigration courts and the BIA as justification for its creation of deadlines and timeframes.[39] However, as immigration judges and appellate immigration judges who have served under many administrations, we understand that each time the agency changes priorities and sets new deadlines and timeframes, the backlog increases rather than decreases. Furthermore, setting arbitrary deadlines and timeframes that must be consistent in every case ignores the reality of the BIA docket. While some appeals are simple, with brief and clear records such that they can be adjudicated quickly, other cases are exceptionally complex with large convoluted records. Appellate immigration judges are professionals. They should be trusted to make decisions about how to prioritize vastly different cases. Setting strict deadlines will lead to mistakes and even more federal court appeals, which will ultimately increase the backlog.

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[37] 85 Fed. Reg. 52507.
[38] 85 Fed. Reg. 52507-08.
[39] 85 Fed. Reg. 52507.

Finally, we are extremely concerned that the proposed regulation would allow cases that are pending beyond 335 days to be referred to the EOIR Director for adjudication.[40] The rule would allow the EOIR Director to issue precedent decisions.[41] However, the EOIR Director is not an Immigration Judge or an Appellate Immigration Judge. The Director, a political appointee, is tasked with running the agency. It is entirely inappropriate for the EOIR Director to be adjudicating appeals that are pending outside of an impracticable time frame. Moreover, it is unrealistic to expect that the EOIR Director could timely adjudicate thousands of cases that the BIA was unable to timely decide. This rule would incentivize quick dismissals of thousands of cases to the detriment of respondents.

L. FORWARDING THE RECORD ON APPEAL

We strongly disagree with the elimination of Immigration Judge review of the transcript of oral decisions contained in the proposed regulations. In our collective experience, this practice is an important step for an accurate and complete decision of the Immigration Judge to reach the appellate courts for review. Immigration Judges issue multiple oral decisions every day, without the benefit of a Court reporter, synthesizing the testimony they just received and other evidence in the record with the ever-changing law. Circuit courts have repeatedly chastised Immigration Judges for issuing incomprehensible decisions. Allowing Immigration Judges to review the transcript allows for a decision that reflects the Judge's work ethic and professionalism to emerge from the trial-level Court. The Immigration Judge can make clerical corrections to the spelling of names of persons and places and insert appropriate punctuation so that the decision is precise and accurate. The Immigration Judge can also make formatting changes to make the decision more readable to the reviewing Appellate Court.

Contrary to the misleading statements in the proposed regulations, Immigration Judges are <u>prohibited</u> from making any substantive decisional changes to decisions when engaging in their review of an oral decision transcript. This is in line with the oath that Immigration Judges take to provide due process to all—substantively changing an oral decision after the parties have received it and made a commitment regarding appeal rights would deprive both the respondent and the Department of appropriate process.

CONCLUSION

We respectfully request that the Department of Justice withdraw, rather than finalize, the proposed rule for all of the reasons discussed above.

Very truly yours,
The Round Table of Former Immigration Judges
/s/
Steven Abrams
Sarah Burr
Esmeralda Cabrera

[40] 85 Fed. Reg. 52512.
[41] 85 Fed. Reg. 52512.

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